IN THE COUNTY COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, CRIMINAL DIVISION
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 2019MM002346AMB DIVISION "B"
2019MM002348AMB
STATE OF FLORIDA

vs.

ROBERT KRAFT,

Defendant.
_____/

STATE'S AMENDED RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

COMES NOW the State of Florida by and through the undersigned Assistant State Attorney, and respectfully moves this Honorable Court to **DENY** the defendant's Motion to Suppress. As grounds therefore the State would show the following:

FACTS

In October of 2018, Detective Andrew Sharp, of the Jupiter Police Department, hereinafter referred to as JPD, began an investigation regarding a house of prostitution and possible human trafficking based upon information received from the Martin County Sheriff's Office. Martin County, through an investigation of their own, determined that the

Town of Jupiter may have a similar business identified as Orchids of Asia Day Spa, located at 103 S. U.S. Highway One, Suite C2, in the Jupiter Square Plaza.

Based upon this information, Det. Sharp began his initial research. The State of Florida Division of Corporations Records revealed that the Orchids of Asia Day Spa became active on February 15th, 2012 and its registered Agent was Hua Zang. Hua Zang's address was listed out of Winter Garden.

A Google search of the Orchids of Asia Day Spa revealed a number of reviews on various search engines. The reviews indicated that this Spa was a "rub and tug" which means it was a Spa that provided sexual services; specifically geared toward the manual manipulation of the men's genitals to the point of climax. The website Rubmaps.com is a forum based website that allows customers, which appear to be all men from the reading of the reviews, to post about their sexual experiences. Customers had to pay for the use of this website. There were specific postings with regards to the Orchids of Asia Day Spa from February 2015 to March of 2018. Detective Sharp also found another paid website, usasexguide.nl\forum, with posts related sexual activity available for purchase at the Orchids of Asia Day Spa.

On November 6th, 2018, Det. Sharp began surveillance on Orchids of Asia Day Spa. Det. Sharp outlined very specifically in his Probable Cause Affidavit the depth of his investigation. Det. Sharp conducted surveillance at the Spa for over seven hours and only observed male customers entering and exiting the Spa through the front door. Surveillance continued from that day until November 14th, 2018. During that time frame the Spa was surveilled 24 hours per day. Each day the Spa opened at about 9:a.m. and closed between 10:30 and 11:30 p.m. Every customer who entered the Spa was male and stayed somewhere between 30 to 45 minutes. JPD maintained a daily log of the surveillance. From November 6th, 2018, to November 14th, 2018, one hundred and four (104) men visited the Spa.

After extensive surveillance with nothing further to be obtained, Det. Sharp requested Karen Herzog conduct a routine inspection of the Spa. Karen Herzog is a Health Inspector with the Florida Department of Health and part of her duties are to make routine and other inspections of businesses. This inspection was performed on November 14th, 2018. Health

Inspector Herzog noted three female employees were inside the Spa. Photographs of the employee's driver's licenses and Massage Therapy Licenses were obtained. Photographs were taken inside the Spa. Health Inspector Herzog took a total of ten photographs. Several of the photographs were disconcerting based upon the initial information received from Martin County. There was a room inside the Spa with two beds, a calendar and items on a container between the beds. There were two other photos depicting a dresser, with what appeared to be personal items within. There was a dresser with what appeared to be multiple type drugs or over the counter medicines. And there was a picture of a door that was locked and, therefore, entry could not be gained by Herzog. After Herzog's inspection she prepared an Inspection Report. Inspector Herzog noted that some tables showed wear and tear and that she advised "Lui."

After the inspection Det. Jordan advised that an Asian female immediately came out the back door of the business and threw away a small plastic bag into the trash dumpster located directly behind the Spa. Det. Jordan and Det. Sharp conducted a trash pull and seized the plastic bag that had just been discarded. They found additional grocery style bags inside the dumpster. Inside one of the grocery bags were several pieces of paper which had been ripped. When put together it appeared to be a spreadsheet with several columns, titled Name, Service, Add Time, Amount, In, Out, Cash, Card, Cert./Pre-Paid, Card Tip and other. One of the names on the spreadsheet was Lulu. Lulu's name had been listed on Rubmaps.com as one of the providers performing illicit massages. Wet napkins found inside the garbage bags were recovered as well and sent for DNA testing. DNA testing revealed the wet substance was seminal fluid.

After exhaustive surveillance, a health inspection, seminal fluid found on napkins that were discarded by the Spa, and the spreadsheet with the name of Lulu (who was now known to have performed illicit massages), the next phase of the investigation began. Evidence gathered revealed that Orchids of Asia Day Spa was not just a spa, but a house of prostitution, a brothel, a place where money was being made by providing women to men for sexual services under the guise of a "massage." This was not just a run- of- the -mill prostitution sting, a "one and done" in which the targets are women walking the streets soliciting "Johns." All of the evidence described above was consistent with this business being used by a highly orchestrated criminal enterprise run by a least one madam, Hua Zang. This was a criminal enterprise being run in a shopping plaza, with a Publix, restaurant, a dental office, a nail salon, and a gaming center. JPD began their next phase of the investigation. JPD would now begin to monitor customer volume and traffic in and out of the Spa. On January 10, 2019, JPD began to monitor the customers entering and leaving the Spa. A detailed surveillance log was maintained. The following is a synopsis of the customers who were pulled over after they were seen going into and exiting the Orchids of Asia Day Spa.

- At 11:20 a.m. a black Ford Escape with a New York tag pulled into the parking lot and parked near the Spa. A white male wearing a black windbreaker, green shorts and tan visor entered the business, "Subject A". At 11:50 a.m. "Subject A" left the business and was followed by Officer Kitchens. A traffic stop was initiated. Det. Sharp conducted a roadside interview with "Subject A" concerning his activity inside the Spa. He told Det. Sharp a friend had referred him to the business. "Subject A" said that he

had been to the business several times previously. "Subject A" told the detective that when he entered the Spa he was in a foyer/lobby where he waited for an employee. He was greeted by an Asian Female, identified as "Ava". "Subject A" advised he asked for a half hour massage and was escorted to a massage room. He disrobed and laid face down on a massage table inside the room. "Subject A" received a massage and when he turned over "Ava" manually stimulated his penis to climax. No condom was used. "Ava" cleaned him off using a hot towel and then provided him with napkins to clean himself. Det. Sharp showed" Subject A" a photograph of Lei Wang and "Subject A" identified her as "LuLu". "LuLu" was identified as the person "Subject A" paid for the massage. Det. Sharp also showed "Subject A" a photograph of Hua Cao, a known employee of the spa. "Subject A" identified the person in the photo as "Ava," the person who performed the sexual service on him. "Subject A" advised he gave "Ava" a tip of $70.00 for the services performed.

- At 1:30p.m. "Subject B" arrived at the business driving a white Hyundai Genesis. When "Subject B" exited the business Officer Kitchens conducted a traffic stop. Det. Sharp then began a roadside interview with "Subject B". He stated a friend had referred him to the business and he had frequented the Spa several times before. "Subject B" said when he entered the Spa he was in a foyer/lobby where he waited for an employee. He described being greeted by an Asian Female where he requested a half hour massage. "Subject B" paid $59.00 for the massage and was escorted to a massage room. "Subject B"

disrobed and laid face down on a massage table. "Subject B" received a massage and when he turned over the female manually stimulated his penis to climax. No condom was used. "Subject B" advised at the conclusion the female cleaned him off using a hot towel and he was then provided with napkins to clean himself. He gave the female $20.00 cash for the sexual services provided.

- At 2:45 p.m. "Subject C" arrives at the Spa driving a white Mercedes Benz SUV. At 3:45 p.m. "Subject C" left the business and was followed by Officer Palladino wherein a traffic stop was initiated. As before, Det. Sharp conducted a roadside interview. "Subject C" stated he had just moved to the area and had been to the Spa previously. "Subject C" stated when he entered the business he was greeted by an Asian female. He asked for an hour long massage and paid $80.00 in cash. "Subject C" was escorted to a massage room where he entered and disrobed. He laid down on the massage table face down and a different female, "Ava" performed the massage. When he turned over on his back the female manually stimulated his penis to climax. No condom was used. "Subject C" advised at the conclusion the female provided him with a hot towel along with napkins to clean himself. Det. Sharp showed "Subject C" a photograph of Hua Cao. He advised he believed the person in the photograph was "Ava". Det. Sharp also showed him a photograph of Lei Wang and he advised he believed her to be the female he paid at the front of the business.

- At 4:50 p.m. "Subject D" exited the business and Officer Kitchens initiated a traffic stop. Det. Sharp conducted a roadside interview with "Subject D" who advised he entered the business and went into the foyer/lobby where he waited for an employee. When he entered the plaza he parked next to a white Mercedes with a maroon roof. "Subject D" advised an Asian female exited the vehicle and entered the business along with him. Inside the business, "Subject D" stated the same female asked him if he wanted one hour. He paid $79 dollars via credit card. "Subject D" had visited the Spa previously and was waited on by the same female. The same female then escorted him to a massage room. Once inside he disrobed and laid face down on a massage table. "Subject D" advised a different female from the initial female gave him a massage and when he turned over the female manually stimulated his penis to climax. No condom was used. The female provided him with a hot towel to clean himself. Det. Sharp showed "Subject D" a photograph of Lei Wang and he identified her as the female driving the white Mercedes and stated she was the same female he paid today and on his previous visit. Lei Wang was identified as one of the Asian females providing sexual services to the customers. Therefore, evidence began to unfold that Lei Wang was not only performing the sexual acts inside the Spa, but deriving support from the running of the criminal prostitution enterprise.

Based on the surveillance conducted over a number of weeks, subpoenaed documents, the interviews with the men who actually partook in the sexual acts, the rubmaps.com website, the name of Lulu on that website, the reviews on another website

describing sex for sale at the Orchids of Asia Spa, Lulu's name on the spreadsheet, the seminal fluid found on the napkins, JPD had established probable cause to apply for a search warrant to place hidden cameras inside the Spa in order to build its case of Deriving Support from the Proceeds of Prostitution, and identify additional co-conspirators in this criminal enterprise.

Det. Sharp submitted an exhaustive Application and Affidavit for Search Warrant Authorizing the Monitoring and Recording of Visual, Non-Audio Conduct. Det. Sharp painstakingly laid out before the court the facts surrounding the investigation revealing exactly what had been done by law enforcement and what could not be done by law enforcement and his knowledge and experience with this specific case. Det. Sharp made crystal clear on page nine of the Application that the warrant being sought was based on the criminal enterprise of Deriving Support from the Proceeds of Prostitution. Other than the sentence on page two of the Application wherein Det. Sharp explains how this information came to be and the type of information imparted. No other reference was ever made with regard to Human Trafficking.

On January 15th, 2019, the Honorable Howard Coates of the Fifteenth Judicial Circuit in and for Palm Beach County reviewed the Application and Affidavit and signed the Search Warrant authorizing covert video surveillance cameras placed in locations where prostitution was believed to be occurring and in the front lobby where the exchange of money was believed to be occurring. Strict guidelines were included in the Search Warrant that no cameras would be placed in any areas expected to be non-criminal in nature such as a kitchen, bathroom, and personal bedrooms. Additionally, the view of the video-monitor would be situated in the monitoring room such that the view was not observable by persons

other than those persons monitoring the view in the proper performance of the monitor's official duty. The non-audio visual surveillance could only be monitored during business hours that had been determined through prior surveillance.

On January 18th, 2019, cameras were placed inside the lobby/foyer area and several massage rooms inside the Orchids of Asia Day Spa pursuant to the Search Warrant. The video cameras were monitored by members of the JPD Operations Support Bureau. The cameras were monitored for a period of five (5) days.

On January 19th, 2019, at 4:44 p.m. the defendant, Robert Kraft, entered the Spa through the front door. He was accompanied by his driver, Peter Bernon. The defendant entered the Spa and cash was exchanged at the front desk with Lei Wang. The defendant was taken by Lei Wang to a massage room. Robert Kraft completely undressed and laid on the massage bed partially covering himself with a sheet. Mingbi Shen then entered the room and massaged Kraft's arm. He then immediately turned ove,r and the sheet was removed. He was now completely naked. Lei Wang came into the room and Kraft laid faced down on the table still completely naked. Both women began rubbing his back and a sheet was then placed over his body. At that point a massage began on the outside of the sheet. A short time later the sheet was removed as Robert Kraft laid on the massage bed face down. Both women were now giving the defendant a massage. The lights in the room were then turned off and both women were now massaging the buttock area. Although the room was dark it was clearly visible as to where the body massage began to become sexual. When the lights were turned back on Robert

Kraft was still completely nude and more sexual activity occurred. After the completion of the sexual act and the cleaning process was finished, Mingi Shen began to dress him. She put on his shirt and then his pants. Both women assisted with buttoning his shirt. The defendant handed additional cash to both of the women and both gave the defendant a warm embrace. Mingibi Shen and Lei Wang then bent down on their knees and placed Robert Kraft's socks and shoes on his feet. After the women dressed the defendant, both he and Lei Wang left the room and went to the front door. Lei Wang and the defendant embraced once again, and the defendant then left the Spa. Robert Kraft entered the front passenger seat of a 2014 white Bentley and drove away.

Officer Kimbark with the JPD conducted a traffic stop on the white Bentley that had just left the Orchids of Asia Day Spa. At the time, none of the JPD officers knew that the suspect who had just committed the criminal act was Robert Kraft. Robert Kraft was seated in the passenger seat. The body worn camera of this traffic stop clearly and unequivocally shows the face of the defendant. Robert Kraft was very polite and respectful during the whole process. The defendant asked Ofc. Kimbark if he was a Dolphins fan. He then told the officer that he was the owner of the Patriots, and that his driver was being nice to him by taking him somewhere. Robert Kraft explained to the officer that he had to go to Kansas City tomorrow. He said that the Patriots were playing the Chiefs. Kraft then showed Ofc. Kimbark his Super Bowl ring. The officer asked the defendant his name again and he said "Robert Kraft." The defendant provided his Massachusetts driver's license. The identification of the defendant was now secure. Charges would ultimately be forthcoming.

The following day, January 20th, 2019, less than 24 hours after his sexual encounter

with Mingbi Shen and Lei Wang, Robert Kraft returned to the spa. He arrived around 11:00 a.m. and went to the front desk. As he had done the day before, Robert Kraft paid in cash and was escorted to a massage room. Just like he did the day before, this time with absolutely no pretext, Robert Kraft completely disrobed and got on the table face up nude. No attempt at any covering of his body was done this second time around. Time was of the essence on this particular day so the sexual act began immediately. Lei Wang entered the well-lighted room and laid on his chest as both Kraft and Wang embraced. She then embraced the defendant again for a longer period of time. Wang then turned off the light and laid on top of his body once again. The second time she laid on his body her shirt came up while Robert Kraft caressed her leg. Immediately thereafter, she massaged his genitals. While this sexual foreplay was occurring the door to the massage room was not completely closed. Light from the outside hallway could clearly be seen. All the while Wang continued her manual manipulation of the defendant's genital area. Wang then moved toward the genital area with her head, and it appeared that oral sex was being performed on the defendant. The defendant now had his hand inside her shirt. They embraced again and again, and after some time passed she began to clean the genital area. The defendant got up off the table completely nude and the warm embraces began again. The door was still slightly open. And as Wang did the day before, she put on the defendant's pants, socks and shoes while on bended knee. While Wang was on bended knee putting on his socks, Robert Kraft handed her more cash. After he was dressed and cash had been provided they embraced once again. Wang then helped Kraft put on his jacket, and Kraft left the room.

These illegal sexual acts were witnessed by the JPD as they were occurring on January 19 and January 20. Based upon the law in the State of Florida, a misdemeanor

committed in an officer's presence would have allowed the JPD to make an immediate arrest. JPD watched the defendant leave the Orchids of Asia Day Spa, get into the passenger side of his Bentleys, and drive away. The JPD could have made the arrest at that time but chose to wait until after the execution of the search warrant of the Spa scheduled for February 19th, 2019. The detective who witnessed the sexual act between Robert Kraft and the masseuses on January 19th transmitted this information to the other officers from the JPD. The JPD then followed the defendant's vehicle and made a traffic stop. Since the JPD had the lawful right to stop the defendant and make an arrest for the misdemeanor charge of Soliciting Another to Commit Prostitution, no traffic infraction for the stop was necessary.

THE STANDARD OF REVIEW CONCERNING A MOTION TO SUPPRESS INVOLVING A SEARCH WARRANT IS RESTRICTED TO THE "FIOUR CORNERS OF THAFFIDAVIT AND APLICATION FOR SEARCH WARRANT

State v. Raab, 920, S.2d 1175 (4th DCA 2006), requires the reviewing court, in a search warrant case, to restrict its review to the four corners of the Affidavit and Application for Search Warrant. The information, facts, and evidence contained within the four corners of that document is the only information, facts, and evidence the reviewing court can rely on in making its determination as to whether or not the neutral and detached magistrate appropriately found probable cause.

> *When so reviewing the issuance of a warrant based on a probable cause affidavit, **a court is confined to a consideration of the four corners of the probable cause affidavit**. See Schmitt, 590 So.2d at 409; Brachlow v. State, 907 So.2d 626, 628 (Fla. 4th DCA 2005). In sum, "[a]lthough the reviewing court 'should afford a magistrate's probable cause decision great deference,' it should 'not defer if*

there is no "substantial basis for concluding that probable cause existed." ' " United States v. Beck, 139 Fed.Appx. 950, 954 (10th Cir.2005).

However, the Raab court did cite *Illinois v. Gates*, 462 U.S. 213, 237103 S. Ct 2317, 2331, 76 L.Ed.2d 527 (1983), to define the standard of review for a trial court facing a claim by a defendant that the search warrant in their case was unlawfully issued:

> *The Gates standard of review of the issuance of a warrant based on a probable cause affidavit centers on three key terms: "probable cause," "fair probability," and "substantial basis." As for probable cause: As a legal concept, "probable cause" is not capable of a bright-line test. Rather, it involves a fact-intensive analysis that necessarily varies from context to context. In particular, the courts are required to weigh two interests that usually are in conflict: society's recognition that its police forces should be given discretion to investigate any reasonable probability that a crime has occurred, and the individual's interest in not being subjected to groundless intrusions upon privacy.* ***Schmitt, 590 So.2d at 409. Such probable cause exists where the probable cause affidavit "reveals 'a fair probability that contraband or evidence of a crime will be found in a particular place.' "*** *United States v. Syphers, 426 F.3d 461, 464 (1st Cir.2005) (citation omitted). Concerning this fair probability: " 'Probability is the touchstone' of this inquiry." United States v. Baldyga, 233 F.3d 674, 683 (1st Cir.2000) (quoting United States v. Khounsavanh, 113 F.3d 279, 283 (1st Cir.1997)).* ***Thus, "[t]he standard of probable cause requires a probability, not a prima facie showing, of criminal activity."*** *United States v. Burke, 999 F.2d 596, 599 (1st Cir.1993); see also United States v. DeQuasie, 373 F.3d 509, 518 (4th Cir.2004)* ***("The probable cause standard does not require officials to possess an airtight case before taking action." (internal quotations and citation omitted)).***

"SNEAK AND PEAK" SEARCH WARRANTS ARE AUTHORIZED IN THE STATE OF FLORIDA

Defendant claims there is no specific statutory authority for a "sneak and peek" search warrant, otherwise known as a "delayed notice" warrant, in Florida and, therefore our State courts have no authority to issue this type of search warrant and they are, "per se", illegal.

Defendant's logic is flawed. Although the term "sneak and peak" is not specifically used within Chapter 933, a warrant authorizing the use of cameras to record the prostitution activities within the Orchids of Asia Spa is authorized within the State of Florida.

Chapter 933 contains two significant statutes that govern the issuance of search warrants. The first is F.S. 933.18, governs search warrants for dwellings. The second statute in Chapter 933, governs searches of all other places, people and things other than dwellings. The State relied on F.S. 933.02(2)(a) and (3) in seeking this search warrant as the majority of the money being made by the Orchids of Asia Day Spa was generated by acts of prostitution, committed by the owner, manager an employees of the spa.

> 933.02 Grounds for issuance of search warrant.—Upon proper affidavits being made, a search warrant may be issued under the provisions of this chapter upon any of the following grounds:
> (2) When any property shall have been used:
> (a) As a means to commit any crime;
> (3) When any property constitutes evidence relevant to proving that a felony has been committed;

The State in this case relied on the authority of this statute to construct a probable cause affidavit in support of a search warrant that authorized the surreptitious entry into the business. This entry was necessary to place cameras inside the Spa which would capture the prostitution acts and the payment by customers for those acts. This was necessary to prove to prove the women were not only engaging in prostitution, but in addition the owner and manager of the spa, and perhaps others, were deriving support from those prostitution acts, which is far more serious as it would constitute a criminal enterprise operating right out in the open.

The absence of the term "sneak and peek" within Chapter 933 has no effect on the validity of the search warrant in this case. The State's response to this swipe at an argument

is that there is no statute that *prohibits* a "sneak and peek"/delayed notice search warrant. The State concedes there are no Florida decisions regarding a delayed notice search warrant ***concerning a search warrant in which video cameras have been placed in a structure for the purpose recording individuals inside.***

There is nonetheless, clear precedent for delayed notices concerning search warrants, such as the one authorized in Defendant's case. One only has to look to Florida Statutes, Chapter 934: *SECURITY OF COMMUNICATIONS; SURVEILLANCE* to see the support for the delayed notice in this case. There are three specific statutes in Chapter 934 which support the authorization for the search warrant in the instant case.

The State looks to F.S. S. Chapter 934 for the purpose of demonstrating to this court there is a precedent for delayed notice search warrants when it comes to an individual's personal conduct being recorded and/or captured by law enforcement, authorized to be recorded or captured by a search warrant.

The wiretap statute for the State of Florida is found in Chapter 934. F.S. 934.09(8)(e) states,

> *within a reasonable time but not later than 90 days after the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his or her discretion to be in the interest of justice (2004)*

Florida decided to be consistent with several other states and the United States government when it agreed that prostitution is, *"not a crime dangerous to life, limb, or property"*. State v. Rivers, 660 So.2d 1360 (Fla 1995) and by that decision removed prostitution from those crimes subject to wiretap orders. However, that does not mean prostitution ***related*** crimes are automatically removed from crimes which may be the object of

a search warrant in which cameras are authorized to be placed in a structure to surreptitiously capture those crimes being committed.

Defendant uses the Title III (federal wiretap statute) to argue for his position that only serious crimes and ***not the minor crime of prostitution*** should be the only crimes the type of search warrant obtained in this case should target. Defendant never gave his subjective definition of what those serious crimes are. This is not a Title III wiretap case. It is a silent video case. Defendant cites several federal appellate cases that use Title III cases as a "guide" for determining the requirements for a silent video search warrant with delayed notice.

These cases make no distinction between a felony and a misdemeanor crime. The Courts hold only that certain criteria must be met before the silent video, delayed notice search warrant can be issued. These cases will be discussed below; but suffice it to say, Florida's wiretap statute does establish a precedent for "sneak and peek" video search warrants with delayed notice.

Another statute providing support for the type of search warrant used in this case is found in F.S. 934.42: Mobile Tracking Device Authorization. This statute authorizes law enforcement to seek a search warrant to place a GPS tracking device on a vehicle and track its movements. Obviously, law enforcement is also tracking the movement of the driver and any occupants. This statute was created as a result of the case of *United States v. Jones*, 132 S.Ct. 945 (2012), which involved government agents placing an unauthorized tracker on Jones's vehicle. The Court determined that law enforcement must obtain a search warrant to place a GPS tracking device on someone's vehicle. Justice Sotomayor, in a concurring opinion, noted this about the intimate details collected by law enforcement when tracking a person in a vehicle:

> *GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations*

Under F.S.S. 934.42, law enforcement officers are required to follow the standards established by the United States Supreme Court for the installation and monitoring of mobile tracking devices shall apply to the installation and use of any device as authorized by this section". F.S. 934.42(5) (2019)

Those standards are found in the Federal Rules of Criminal Procedure, Section 41, Search and Seizure. When law enforcement officers collect data from a GPS device attached to a vehicle, they conduct a search under the 4th Amendment. *Jones* Because Article 1, Section 12 of our Constitution mandates we conform to the United States Supreme Court's interpretation of the application of the 4th Amendment, and Section 41 of the Federal Rules of Criminal Procedure were created by the U.S. Supreme Court, law enforcement is required to follow these rules when it comes to search and seizure issues. This is the introduction paragraph to the Federal Rules of Criminal Procedure:

> *This document contains the Federal Rules of Criminal Procedure, as amended to December 16, 2016. The rules have been promulgated and amended by the United States Supreme Court pursuant to law, and further amended by Acts of Congress. This document has been prepared by the Committee in response to the need for an official up-to-date document containing the latest amendments to the rules.*

The Federal Rules of Criminal Procedure, 41(e)(2)(C) authorizes a delayed notice to be given to the subject of the tracker,

> *Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must* ***not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each.***

Florida law enforcement officers are mandated by statute to follow this time frame. The State points to the above in support of the search warrant issued in this case and the support for a delayed notice.

Both the wiretap statute, which allow a 90 delay notice to the persons affected by the warrant and the tracker statute, which allows a 45 days delay notice and, with a good basis, another 45 days, involve warrants which capture highly personal information about the people they are used against. So, to, is a video recording which captures a person at a fixed location captures personal information as to their conduct, but somewhat less intrusive than recording their personal conversations with a wiretap warrant or finding out where they are at every moment of a 45 or 90 day period, through the use of a GPS tracker. These established statutory periods of delay of notice to those affected by these types of search warrants only serve to support the State's position that the type of warrant obtained in this case was authorized. Combine that point with the holdings of the federal cases below and it is clear the warrant in this case was lawfully.

AUTHORITY TO FOLLOW CASE LAW FROM BOTH FEDERAL COURTS AND COURTS OF OTHER STATES WHEN NO CASE LAW ON POINT IN FLORIDA EXISTS

Defendant states this in his motion to suppress,

> *It follows that the JPD's "sneak and peek" video surveillance could never have been authorized under analogous federal provisions, even if Florida had adopted them as its own, which it most assuredly has not. By all indications, therefore, the search at issue went beyond the pale of any authority or analogy law enforcement might grasp to invoke. Put plainly,* ***there was no legal authority—under state or federal law—for the extraordinarily intrusive "sneak and peek" Warrant requested and issued here.***

Defendant's argument is just plain wrong. Defendant completely missed this legal principle stated in *Markus v. State*, 211 So.3d 894 (Fla. 2017)

> *While the conformity clause within this section (Article 1 Section12) requires this Court to adhere to the interpretations of the United States Supreme Court, this Court is not bound to follow the decisions of other federal courts.* Smallwood v. State, *113 So.3d 724, 730 (Fla. 2013).* ***In the event that there is no United States Supreme Court precedent factually and legally on point, Florida appellate courts may review Florida state precedent, as well as other state and federal decisions for guidance on a search and seizure issue.*** ***Higerd v. State, 54 So.3d 513, 517 (1st DCA 2010); Jones v. State, 459 So.2d 1068, 1072 (2d DCA 1984)***

There are always cases of first impressions for states and, no matter the reason, if the State can prove the legal support for the actions it takes, the lack of Florida case law is certainly a factor, to consider but a Florida court can certainly rely on other like cases outside of Florida to make an informed decision about the issues in the case before it.

Defendant claimed there were no Florida cases that supported a "sneak and peek/delayed notice search warrant. According to Defendant's motion, he made that conclusion based on his search of only Florida law. That was fatal to his cause. Defendant failed to recognize that the Florida Constitution, Article I, Section 12, mandates that we adhere to the interpretation by the United States Supreme Court for all 4th Amendment issues. Defendant missed a seminal case which established 40 years ago, that delayed notice search warrants specifically obtained for the purpose of installing surveillance equipment to record the criminal conduct of individuals was authorized and fully supported by the United States Supreme Court.

That case is Dalia v. United States, 99 S.Ct. 1682 (1979). Dalia was a subject who was a member of a conspiracy to steal goods and re-sell them. Federal agents obtained a Title III wiretap order to use against Dalia and others in his group. Although this is a wiretap case, the holdings to surreptitious delayed notice search warrants in general.

Concerning the issue of covert entries to place electronic recording devices in a structure to record subjects involve in criminal activity, the court said this:

> *It is well established that law officers constitutionally may break and enter to execute a search warrant where such entry is the only means by which the warrant effectively may be executed. See, e. g., Payne v. United States, 508 F.2d 1391, 1394 (CA5 1975); cf. Ker v. California, 374 U.S. 23, 28, 38, 83 S.Ct. 1623, 1627, 1632, 10 L.Ed.2d 726 (1963); 18 U.S.C. § 3109*

Concerning the delayed notice issue the court said this:

> *In United States v. Donovan, 429 U.S. 413, 429 n. 19, 97 S.Ct. 658, 669 n. 19, 50 L.Ed.2d 652 (1977), we held that Title III provided a constitutionally adequate substitute for advance notice by requiring that once the surveillance operation is completed the authorizing judge must cause notice to be served on those subjected to surveillance. See 18 U.S.C. § 2518(8)(d). There is no reason why the same notice is not equally sufficient with respect to electronic surveillances requiring covert entry.*

One of the most critical holdings of this case addresses the argument made by Defendant Kraft, that the judge issuing the search warrant must make certain findings in issuing the search warrant. That could not be farther from what is contained in a legally sufficient search warrant. Dalia argued the search warrant was unlawful because the issuing judge did not specifically state that covert entry was authorized. Disagreeing with this contention by Dalia the Court held:

> *The Fourth Amendment requires that search warrants be issued only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*
>
> ***Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to***

> ***be executed.*** *On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant*

Since *Dalia* is a United States Supreme Court case and Florida adheres to the ruling of the U.S. Supreme Court in their interpretation of 4th Amendment issues, search warrants such as the one in the case at bar are legally authorized to be issued and executed in Florida.

In addition to Defendant's claim that the state of Florida does not authorize the type of search warrants used in the case, Defendant also claims the covert video surveillance violated the 4th Amendment to the U.S. Constitution and the Florida Constitution.

Every single case Defendant cites in an effort to support these two claims actually support the search warrant that was issued and executed in the case at bar. In *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir.. 1990), the court stated:

> *Unfortunately, Congress has not yet specifically defined the constitutional requirements for video surveillance.* ***Nevertheless, the general fourth amendment requirements are still applicable to video surveillance;*** *and suppression is required when the government fails to follow these requirements.*

In *Mesa-Rincon*, FBI agents obtained a search warrant that authorized them to place television cameras inside a building and record subjects involved in **counterfeiting United States currency**. To this date neither Florida nor Congress has defined the constitutional requirements for video surveillance, but it is still legally authorized, as long as the State abides by the 4th Amendment requirements.

The Court in *Mesa-Rincon* said this in identifying the requirement that must be met in order to obtain a search warrant authorizing video recording:

> *Although Congress has not yet delineated the requirements for video surveillance, we find guidance in case law and congressional enactments concerning similar search and seizure techniques. We*

> *have considered carefully the underlying purposes of the fourth amendment and the intrusiveness of video surveillance. Having done so, we now adopt the following five requirements for video surveillance that define more specifically the probable cause and particularity requirements of the fourth amendment. These requirements have been formulated for other search techniques, and we hold that they must be satisfied before video surveillance will be permitted. An order permitting video surveillance shall not be issued unless:* ***(1) there has been a showing that probable cause exists that a particular person is committing, has committed, or is about to commit a crime; (2) the order particularly describes the place to be searched and the things to be seized in accordance with the fourth amendment; (3) the order is sufficiently precise so as to minimize the recording of activities not related to the crimes under investigation; (4) the judge issuing the order finds that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or appear to be too dangerous; and (5) the order does not allow the period of interception to be longer than necessary to achieve the objective of the authorization, or in any event no longer than thirty days.***

As much as Defendant has made of the fact that he was charged with two "minor misdemeanor crimes" and argues the authorization for search warrants of the type used in his case are meant only for "serious felonies", (which Defendant never defines), Defendant cites to no case to support his claim. Defendant states in his motion,

> *In* ***all*** *of those cases, however, the underlying criminal activity that was surveilled involved felonies that were far more serious than the misdemeanor prostitution alleged to have taken place.*

In fact, the cases Defendant does cite to argue against the warrant issued in this case **actually support the State's argument** these warrants can be issued for **"any crime"**, as long as certain criteria are met. Again, Defendant was not the original target of the search warrant, the women running the prostitution enterprise were the targets. Defendant just happened to be captured committing a misdemeanor crime while videotaping was being conducted for the crime of Deriving Support from the Proceeds of Prostitution.

Defendant argues that Title III (wiretap) provisions govern this case, they do not, as is made clear in *United States v. Biasucci*, 786 F.2d 504, 510 (2d Cir. 1986),

> ***Applications for video surveillance should not be strictly judged by all of the other procedures and requisites of Title III**, however, because, like the Seventh Circuit, we borrow the statutory standards quoted above as a measure of the government's constitutional obligation.*

About the type of crime these video search warrants can lawfully be issued for, the *Biasucci* court said this,

> *...nothing in Title III or the FISA indicates that Congress intended to prohibit video surveillance in **domestic criminal investigations**. Thus, all that can be said is that Congress has not yet enacted any legislation explicitly authorizing domestic electronic video surveillance.*

The *Biasucci* court then stated the requirements which must be met in order for a video search warrant to be issued, adopting these requirements from yet another case cited by Defendant, *United States v. Torres*, 751 F.2d 875, 876 (7th Cir. 1984):

> *(1) the judge issuing the warrant must find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," 18 U.S.C. § 2518(3)(c); (2) the warrant must contain "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates," id. § 2518(4)(c); (3) the warrant must not allow the period of interception to be "longer than is necessary to achieve the objective of the authorization, []or in any event longer than thirty days" (though extensions are possible), id. § 2518(5); and (4) the warrant must require that the interception "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under [Title III]," id.*

The *Biasucci* court then stated:

> *all of the constitutional requirements set out above were met. The*

> *application contained the following: (1) written authorization from the Department of Justice; (2) a particular description of the location, people, and offenses to be surveilled; (3) a statement regarding the necessity for such surveillance; (4) minimization procedures so that only authorized activity would be surveilled; and (5) provision for periodic reports on the progress of the surveillance. In addition, the affidavits submitted by an Assistant United States Attorney and an FBI Special Agent sufficiently detailed the basis for probable cause to believe that criminal activities were being conducted in the Resource Capital offices and explaining why other means of investigation were inadequate. Finally, the warrant was issued for only thirty days (although later extended for an additional thirty days) and contained all the requisite findings and protections. Id at 510 and 511*

Mesa-Rincon states this about law enforcements obligation to demonstrate necessity,

> ***We will find authorization of video surveillance improper* only when the government fails to attempt or explain its failure to attempt all reasonable alternative investigatory techniques.** ***The determination of reasonableness will be based on the individual facts of each case.*** Mesa-Rincon at 1441

Defendant's claim that there "is no authority for video surveillance in Florida" is flatly wrong. Not only for the reasons and court cases discussed above, but because, since 2013, Florida's Drone statute has been in existence. This statute authorizes law enforcement to conduct video recordings of individuals in private settings **with a search warrant.**

> 934.50 Searches and seizure using a drone.—
> (1) SHORT TITLE.—This act may be cited as the "Freedom from Unwarranted Surveillance Act."
> (2) DEFINITIONS.—As used in this act, the term:
> (a) "Drone" means a powered, aerial vehicle that:
> 1. Does not carry a human operator;
> 2. Uses aerodynamic forces to provide vehicle lift;
> 3. Can fly autonomously or be piloted remotely;
> 4. Can be expendable or recoverable; and
> 5. Can carry a lethal or nonlethal payload.

(b) "Image" means a record of thermal, infrared, ultraviolet, visible light, or other electromagnetic waves; sound waves; odors; or other physical phenomena which captures conditions existing on or about real property or an individual located on that property.

(c) "Imaging device" means a mechanical, digital, or electronic viewing device; still camera; camcorder; motion picture camera; or any other instrument, equipment, or format capable of recording, storing, or transmitting an image.

(e) "Surveillance" means:

1. **With respect to an owner, tenant, occupant, invitee, or licensee of privately owned real property, the observation of such persons with sufficient visual clarity to be able to obtain information about their identity, habits, conduct, movements, or whereabouts;**

(3) PROHIBITED USE OF DRONES.—

(a) A law enforcement agency may not use a drone to gather evidence or other information.

(b) A person, a state agency, or a political subdivision as defined in s. 11.45 may not use a drone equipped with an imaging device to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent. For purposes of this section, a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

(4) EXCEPTIONS.—This section does not prohibit the use of a drone:

(a) To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk.

(b) If the law enforcement agency first obtains a search warrant signed by a judge authorizing the use of a drone.

(5) REMEDIES FOR VIOLATION.—

(6) PROHIBITION ON USE OF EVIDENCE.—Evidence obtained or collected in violation of this act is not admissible as evidence in a criminal prosecution in any court of law in this state.

History.—s. 1, ch. 2013-33; s. 1, ch. 2015-26; s. 10, ch. 2017-150.

Defendant claims the search warrant was unlawfully issued because it did not contain certain findings. They cite no case to support this. In fact, Defendant cites to a case which proves Defendant is incorrect in this assertion. The *Torres* court stated what is clear concerning the search warrant document – **it is not an opinion piece, nor is it a document in which the judge reviewing the search warrant makes specific findings concerning the justification for the warrant:**

> *The defendants complain, finally, that the warrants in this case did not explain the basis of the judge's finding of probable cause and did not identify as safe houses the addresses at which the surveillance was to be conducted. This complaint misapprehends the purpose of a search warrant, which is twofold: to show that a judicial officer authorized the search (cf. Johnson v. United States, 333 U.S. 10, 13–14, 68 S.Ct. 367, 368–369, 92 L.Ed. 436 (1948)), and to indicate to the government agents who will execute the warrant what the limits of the authorization are (cf.* ***Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927)). A warrant is not a judicial opinion, and the basis for the warrant is not in the warrant itself; as Rule 41(c)(1) makes clear, it is in the application for the warrant. The application in this case set forth in full and convincing detail*** *the reasons for thinking that the addresses where the surveillance was to be conducted were FALN safe houses, that normal investigative methods would be unavailing, and that television surveillance was an appropriate supplement to electronic eavesdropping. The truth of the recitals in the applications is not controverted, and they provided an adequate factual basis for the warrants.*

AFFIANT DEMONSTRATED THAT ISSUANCE OF WARRANT WAS NECESSARY TO FURTHER HIS INVESTIGATION INTO THE FELONY OFFENSE OF DERIVING SUPPORT FROM PROCEEDS OF PROSTITUTION

Defense claims that the warrant must be suppressed because law enforcement did not exhaust all less-invasive investigatory techniques or provide an adequate explanation for doing so. It is well settled that in order to conduct video surveillance, law enforcement does not need to exhaust every other conceivable investigative procedure. *Covello v. State*, 462

So2d 1206 (4th DCA, 1985). See also, *US v Concepcion*, 579 F3d 214 (2nd Cir. 2009); *Shaktman v. State*, 529 So2d 711 (3rd DCA, 1988). In this case, Sharp's affidavit clearly outlines a thorough and competent investigation in which he utilized record searches; subpoenas; traditional surveillance; remote surveillance; investigative trash retrievals; searches of a subscription-only website providing reviews to its members of sexual services received at the spa; "john stops," during which customers of the spa were interviewed about the illicit activity inside; amongst other things. The affidavit goes on to detail why other traditional investigative techniques would not have been effective or safe, including use of an undercover officer, and interviewing current or past employees.

Defense cites to portions of an administrative hearing in the case of *Department of Health Board of Massage Therapy v. Tang long Life Therapy Massage*, as evidence to show that Detective Sharp was untruthful in his assertion that use of an undercover agent would not have been safe or effective in the instant case. While the defense claims that these carefully excised portions of the administrative hearing demonstrate that use of an undercover agent has been successfully used by another agency is proof that it could have been utilized in this case, this argument is disingenuous at best. The stated goal of Detective Sharp's investigation was to investigate the crime of **deriving support from the proceeds of prostitution**, a felony offense, with the main targets of the investigation being the owner and manager of the Orchids of Asia Day Spa. As defense counsel Goldberger is undoubtedly aware, as he was the attorney of record for the defense in the above-referenced administrative hearing, that no owner or employee was arrested or charged with any felony offense in the *Tang Long Life* case, and in fact no person was convicted of ***any*** crime arising out of that

investigation. It appears that the selected portions of the hearing attached as exhibits in the defendant's motion were included with the sole purpose of misleading this Court.

THIS CASE IS NOT ABOUT A "SIMPLE CRIME OF MISDEMANOR" AS ARGUED BY DEFENDANT – THERE IS A FELONY THAT IS THE OBJECT OF THE SEARCH WARRANT

Defendant's argument in his cases is that there is no basis for this search warrant to be issued, ***based on a simple case of misdemeanor***. The issue of the search warrant is not, as Defendant wants everyone to believe, driven by his misdemeanor prostitution charges. Defendant, along with the other 24 men who are similarly situated are charged with soliciting prostitution because they paid women for sexual acts and these women derived support from those paid sexual acts. Defendant and the others were simply at the wrong place at the wrong time and captured by law enforcement committing their misdemeanor crimes. They were not the "target" of the search warrant, as Defendant is portraying himself.

The Defendant's emphasis on the misdemeanor is misplaced and without any legal merit. Under F.S. 933.02(2)(a), a search warrant may be issued for a property, ***when any property shall have been used: (a) as a means to commit any crime.*** The statute does not require the crime to be a felony, the crime can be the misdemeanor crime of prostitution. The fact is the Orchids of Asia Spa was being used by the woman who owned it, the woman who managed it and the women who worked there, as a business generating profits from the proceeds of acts of prostitution.

In *State v. Blanco*, 339 So.2d 1137 (2nd DCA 1976), officers executed a felony search warrant based on lottery crimes. While executing the warrant they saw Blanco holding lottery paraphernalia. The officers arrested Blanco ***and charged him with only a misdemeanor.*** The court said this about the charges:

> *An arrest was proper in the case before us since probable cause existed to believe appellee was committing a misdemeanor in the presence of an officer. Section 901.15, Florida Statutes. The evidence at issue here is admissible in the prosecution of an offense not contemplated at the time of the arrest. See generally Brown v. State, 46 So.2d 479 (Fla.1950); Farmer v. State, 208 So.2d 266 (Fla.3d DCA 1968).*

Defendant has continuously claimed the search warranted targeted him and the others similarly charged with a misdemeanor. The number of times this has been claimed, both in court, in the media and in filings is too many to count. However, this is not true. Defendant is no different than Defendant Blanco, who happened to commit a misdemeanor crime in the presence of law enforcement officers while the officers were executing a search warrant. Both had bad luck and bad timing. Both committed crimes for law enforcement to see first-hand. Any other day in which cameras were not in Orchids, Defendant would be free to commit his crimes without anyone but he and the women who serviced him knowing about it. But, wrong place and wrong time aside, his arrest for a misdemeanor was driven by law enforcement's lawful search warrant ,which was driven by the felony crime of Deriving Support from the Proceeds of Prostitution, not, as Defendant has said one hundred times over, driven by a "minor prostitution crime". As much as Defendant would like to herald the evils of law enforcement and the State in obtaining and executing this search warrant, claiming this was an overreach because he "committed a minor crime" has no legal support.

Defendants rely on dicta in *Torres* disapproving of the use of television surveillance in a private home for all but the most serious of offenses. In approving covert video surveillance inside a gambling business, *United States v. Williams*, 124 F.3d 411, stated:

"We note that every court of appeals that has addressed video surveillance has held that video surveillance conforming to the standards set out in Title III is constitutional, and we have found no case that suggests that the application of these standards depends up on the nature of the crime investigated... Moreover, we are skeptical of the defendant's general suggestion that a judicial officer, in deciding whether to issue a search warrant or in reviewing the issuance of a search warrant, should take into account his or her own evaluation of the seriousness of the felony or felonies under investigation." *Williams* at 417.

The *Williams* court also recognized the distinction between surveillance conducted in a private home vs that conducted in a public business, and noted that Fourth Amendment restrictions are much less restrictive when the place to be searched is a business.

THERE ARE NO MATERIAL MISREPRESENTATIONS OR OMISSIONS THAT RENDER THIS WARRANT INVALID AND UNLAWFUL

A magistrate's determination of probable cause should be paid great deference by reviewing courts. When a search warrant has been issued, the defense has the burden of going forward, and the burden to establish grounds for suppression. *State v. Setzler*, 667 So.2d 343 (1st DCA 1995). Special deference may be owed fact finding by a magistrate who has issued a search warrant after finding probable cause. *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). *See also, Illinois v. Gates*, 462 U.S. 213, 237103 S. Ct 2317, 2331, 76 L.Ed.2d 527 (1983).

Under *Franks v. Delaware*, 438 U.S. 154 (1978), if an affidavit for a search warrant contains an intentional false statement or statements make with reckless disregard for the truth, the trial court must excise the false material and consider whether the affidavit's

remaining content is sufficient to establish probable cause. The rule contains two components. First the trial court must determine whether the affidavit contains and intentional false statement or a statement made in reckless disregard for the truth. Mere neglect or statements made by innocent mistake are insufficient. *Thorp v. State*, 777 So.2d 385 (Fla 2000). Second, if the court finds the police acted deceptively, the court must excise the erroneous material and determine whether the remaining allegations in the affidavit support probable cause. If the remaining statements are sufficient to establish probable cause, the false statement will not invalidate the resulting search warrant. *Franks*, at 154

Franks requires the defendant to make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit. "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant." *Franks* at 171.The Supreme Court held in *Rugendorf v. United States*, 84 S.Ct. 825(1964):

> No Fourth Amendment question was presented when the claimed misstatements in the search warrant affidavit "were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit. Where erroneous statements were not those of the affiant, the movant failed to show that the affiant was in bad faith or that he made any representations to the Commissioner in securing the warrant. *Rugendorf* at 533.

Franks sets out the legal burden defense must meet in order to merit a hearing on the issue of false statements in an affidavit for a search warrant:

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. **There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.** They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any non-governmental informant. Finally, if these requirements are met, and if, when the material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, ***no hearing is required.*** (emphasis added) Franks at 171-172.

See also, *United States v. Novaton*, 271 F.3d 968, 987 (11th Cir., 2001):

"The Supreme Court made it clear in Franks that in order to be entitled to relief a defendant must show not only that misrepresentations or omissions were intentionally or recklessly made, but also that, absent those misrepresentations or omissions, probable cause would have been lacking. That is the test of materiality, and materiality is essential no matter how deliberate or reckless the misrepresentations were."

The defense's claim that the warrant was issued based on material misrepresentations and omissions is facially insufficient, and should be summarily denied. The only specific

claim of misrepresentation in the defense's motion is their argument that Detective Sharp somehow hoodwinked Judge Coates into signing the warrant, based on a false claim that his investigation centered on human trafficking. This claim is wholly without merit. The affidavit in support of probable cause states that the offense being investigated is **Deriving Support from the Proceeds of Prostitution**, in violation of Chapter 796 of the Florida Statutes. The affidavit mentions human trafficking one time, in the following sentence, which is the first sentence of the probable cause affidavit: "In late October of 2018, I initiated a ***prostitution investigation*** (emphasis added) based on information received from Detectives with the Martin County Sheriff's Office. Detectives from the Martin County Sheriff's Office advised they were working several cases of prostitution and human trafficking at Asian Massage Parlors in their county." The affidavit goes on to detail Detective Sharp's investigation into prostitution and deriving support from the proceeds of prostitution. The affidavit is in no way misleading as to the crime being investigated. No mention of human trafficking is ever made, aside from the initial statement regarding Martin County's investigation.

Defense counsel's attempt to use any statements made by Jupiter Police Chief Kerr, State Attorney Dave Aronberg or Martin County Sheriff William Snyder to bolster their argument is patently ridiculous and irrelevant to the review by this court as to whether or not the search warrant in this case was lawfully issued by the neutral, detached magistrate, Judge Coates. The statements by these agency heads were made weeks after Judge Coates reviewed the affidavit and signed the search warrant, based upon his finding that probable cause existed to place the recording cameras inside of the Orchids of Asia Spa.

In *Ilinois v. Gates*, 103 S.Ct. 2317 (1983), the Court made it abundantly clear the separate duty each judge had in the search warrant process.

> ***The task of the issuing magistrate is*** *simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place.*
>
> ***And the duty of a reviewing court is*** *simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. This flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from* Aguilar *and* Spinelli.

Defendant, despite the holding of the United States Supreme Court in *Leon*, would have this court, as the reviewing court, look at the affidavit and application for search warrant as if it was being reviewed for the first time. The United States Supreme Court said that this is improper.

> *We have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." Spinelli, supra, 393 U.S., at 419, 89 S.Ct., at 590 Leon at 2331*

> *"the traditional standard for review of an issuing magistrate's probable cause determination has been that* ***so long as the magistrate had a "substantial basis for ... concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more."*** Jones v. United States, *362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960). Leon at 2330*

The Court in *Saul ORNELAS and Ismael Ornelas–Ledesma v. U.S.*, 116 S.Ct. 1657 (1996) determined when a search should be reviewed *de novo,*

> *"The ultimate questions of reasonable suspicion to stop and probable cause to make a* ***warrantless search*** *should be reviewed de novo"*

The defense points to observations made by Florida Department of Health inspector Karen Herzog, which were reported to Detective Sharp and included in his probable cause statement, as to the appearance of some employees living at the spa. It is unclear whether the defense is arguing that Herzog's statements to Sharp about what she observed were false, or whether Sharp recklessly misrepresented what she told him. Either way, this argument fails.

The defense has presented no evidence that the statements were either false, or material. As the affidavit would still contain more than adequate probable cause to support the warrant absent any mention of Herzog's observations, the claim must be denied without hearing. Moreover, while the defendant's motion states that there are "other strong indicia that Sharp deliberately misrepresented critical points in his affidavit," (see Defendant's Amended Memorandum of Law in Support of Motion to Suppress, page 26) the defendant fails to allege the misrepresentations with any specificity, and fails to accompany them with any proof. The law does not provide any right to a hearing based on such blanket, unsupported allegations. See *Franks*.

HERZOG'S ROUTINE INSPECTION OF THE SPA WAS NOT A WARRANTLESS SEARCH IN VIOLATION OF THE FOURTH AMENDMENT

The defense claims that Florida Department of Health inspector Karen Herzog's routine inspection of the Orchids of Asia Day Spa conducted on November 14, 2018, was an unlawful search, and therefore the "fruits" of such search must be suppressed. This claim fails for several reasons. First, Defendant has no claim to an expectation of privacy at the business on the date of the inspection, which was months prior to Defendant's visits to the Spa. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Alderman v. United States*, 89 S.Ct. 961 (1969), See also, *Rackas v. Illinois*, 99 S.Ct. 421 (1978). The Defendant has no proprietary interest in the business, and was neither present nor recorded on the date of the inspection. Thus, even if the court were to find that Herzog's inspection of the spa violated the Fourth Amendment, that finding would have **no relevance** to this Defendant's case.

Moreover, defense has provided no evidence to support their claim that Herzog's administrative inspection of the Spa, which was due for an inspection, exceeded the scope of her administrative duties and had as its primary objective the collection of evidence to prove criminal activity. "Although the Fourth Amendment provides some protection against administrative or regulatory searches, such investigations are generally less intrusive than one which could potentially lead to criminal sanctions, and are accordingly more likely to be tolerated by the Fourth Amendment." *Jacob v Township of West Bloomfield*, 531 F.3d 385 (6th Cir. 2008). The District Court of Appeals for the 6th Circuit in *Widgren v. Maple Grove*

Township, 429 F.3d 575 (6th Cir., 2005), explained some of the factors used to distinguish between criminal and administrative investigations:

> *[Administrative] matters may be looked into in a much shorter period of time than if often takes to search for evidence of crime, and certainly no rummaging through the private papers and effects of the householder is required. Nothing is seized. A police search for evidence brings with it "damage to reputation resulting from an overt manifestation of official suspicion of crime." A routine inspection that is part of a periodic or area inspection plan does not single out any one person as the object of official suspicion. The search in a criminal investigation is made by armed officers, whose presence may lead to violence, and is perceived by the public as more offensive that that of the inspector. Police searches are conducted at all times of the day and night, while routine inspections are conducted during regular business hours. By their very nature and purpose, police searches usually must be conducted by surprise. In contrast, come inspection programs involve advance notice that the inspector will call on a certain date, and an inspector in his rounds will sometimes agree to return at a more convenient time if the householder so requests." Widgren at 584.*

The defense has made no showing that the inspection by Herzog was anything other than a routine administrative inspection. The fact that she photographed certain items and shared her observations with Detective Sharp following her inspection, does not transform her routine, administrative inspection into an unlawful search.

The cases cited by defense include *United States v. Rahman*, 805 F.3d 822 in which a fire inspector was found to have violated the Fourth Amendment after making repeated searches of the scene of a fire over the course of several days. In that case, the Court found that the fire inspector exceeded the consent given by the owner to search for the cause and origin of the fire by continuing to search for evidence of arson in places that had been excluded as the possible origin of the fire. This case is wholly distinguishable on its facts from what occurred here, which was a routine, administrative inspection well within Herzog's authority, and not designed to discover evidence of a crime.

FAILURE TO COMPLY WITH 10 DAY INVENTORY/RUTURN RULE IS NOT GROUNDS FOR SUPPRESSION

With respect to defendant's Motion to Suppress, page 6, paragraph 8 the State submits the claim is totally without merit. The defendant maintains that Det. Sharp's failure to comply with the 10 day Inventory/Return and the failure to deliver to Hua Zhang the warrant itself "should be fatal in and of themselves." However, no case law was cited in neither the actual Motion nor the Amended Memorandum. This was not an oversight by Kraft's team of lawyers. This was a deliberate attempt to mislead the court. A lawyer licensed to practice in the State of Florida or who is given the privilege to practice in this State is well aware of the canon of ethics which requires each side to provide case law that is contrary to its position. The Kraft team failed to do so.

The search warrant regarding the installation of covert surveillance inside the Orchids of Asia Day Spa was executed beginning January 17th and into January 18th of 2019. The Inventory/Return was filed with the Clerk of Court on January 31st, 2019, thirteen days later. Pursuant to F.S.S. 933.05:

"A search warrant cannot be issued except upon probable cause supported by affidavit or affidavits, naming or describing the person, place, or thing to be searched and particularly describing the property or thing to be seized; no search warrant shall be issued in blank, and any warrant shall be returned within 10 days after issuance thereof."

In *Nofs v. State,* So. 2d 308(2nd DCA1974), appellant contended that evidence obtained by a search warrant should be suppressed because of the officer's failure to properly file the Return with the court. The Appellate court held that "return of a search

warrant is a ministerial act and any failure therein does not void the warrant unless prejudice is shown." In the case at bar, no allegation by the Kraft team was made, nor can it be made, that any prejudice to the defendant occurred by Det. Sharp filing the Inventory/Return three days late. And, the search warrant was ordered sealed by the Honorable Howard Coates and was forbidden to be seen by anyone other than law enforcement. *See also* Featherstone v. State, 246 So. 2d 597 (2nd DCA1985).

The execution of the "sneak and peak" search warrant was performed in secret, and as stated above, sealed by Judge Coates. Thus, it stands to reason that Hua Zhang, the owner, operator and sex worker of the Orchids of Asia Day Spa would not be given a copy of the warrant at the time of execution on January 17th, 209.

THE TRAFFIC STOP OF ROBERT KRAFT'S VEHICLE WAS PURSUANT TO F.S.S 901.15 WHICH PERMITS AN OFFICER TO MAKE A WARRANTLESS ARREST FOR MISDEMEANORS COMMITTED WITHIN THE OFFICER'S PRESENCE

Page (9) nine of the Amended Memorandum of law, titled **(F),** claims the traffic stop of the defendant was unlawful. The Kraft team argues the legality of the traffic stop in support of its position. The defense even goes so far as to argue "the JPD had no genuine legal basis for a stop when it pulled over the car on January 19th 2019." This argument is again, totally without merit. Robert Kraft had just committed a crime in the JPD's presence. F.S.S 901.15 permits an officer to make an arrest without a warrant for a misdemeanor "immediately" or in

fresh pursuit." "Immediately means just that---IMMEDIATE! The detective who witnesses the defendant receive sexual services inside the Orchid of Asia Day Spa could have immediately arrested Robert Kraft on the actual premises or when walking out the door, or anywhere. JPD chose not to do so due to the continuing investigation. The stop was made for the sole purpose of identification. No traffic violation need occur. Based on the fellow officer rule, the officer who ultimately made the stop need not be the one who actually witnessed the crime. *Nickell v. State,* 722 So. 2d 924 (2nd DCA 1980). *See also State v. Bowers,* 87 So. 3rd 704 (S. Ct. 2012), *Nesmith v. State,* 608 So. 2d 96 (2nd DCA 1992), *Reza v. State,* 163 So. 2d 572 (3rd DCA 2015), *Rosenberg v. State,* 264 So. 2d 68 (4th DCA 1972), *State v. Warren,* 329 So. 2d 383 (1st DCA 1976).

DEFENDANT HAD NO EXPECTATION OF PRIVACY WHILE INSIDE THE ORCHIDS OF ASIA DAY SPA

Defendant can make no legitimate claim to an expectation of privacy as a customer at Orchids of Asia Day Spa. The United States Supreme Court, as well as other courts, tell him that. In fact, Defendant himself implicitly told the world that he had no legitimate expectation of privacy while inside the Orchids of Asia Spa, while sexual acts he paid for were performed on him.

The video-recoding of Defendant having these sexual acts performed on him by the women inside the spa shows eight (8) different times the door opens to the room during the time these sex acts were being performed. Anyone going by or looking into the room

Defendant was in can see the Defendant and the woman during the time Defendant is engaging in sex acts with the women.

This is what is captured on the video-recording, that anyone passing by the open door could see occurring in the room:

28:40: Defendant fully naked, laying on his back, with his feet towards the door and legs spread, exposing his penis.

28:54: Defendant fully naked, laying on his back, with his feet towards the door and legs spread, exposing his penis.

29:19: Defendant fully naked, laying on his back, with his feet towards the door and legs spread, exposing his penis, with the woman holding his penis in her hand.

30:37: Defendant, fully naked, laying on his back, with his feet towards the door and legs spread, exposing his penis and a woman is wiping his penis off.

31:31: Defendant, fully naked, laying on his back, with his feet towards the door and legs spread, exposing his penis and a woman is wiping his penis off.

32:47: Defendant fully naked, laying on his back, with his feet towards the door and legs spread, exposing his penis.

36:50: A woman is hugging and kissing Defendant, then rubs his stomach and thigh while he is Defendant is covered with a Sheet

38:08: Defendant can be seen standing up, with his back to the door, naked.

Additionally, on his second visit to the Orchids of Asia Spa, during the entire time a woman is performing sexual acts on Defendant, the door to the room is cracked, so anyone passing by the door could peek through the crack and see Defendant having sexual acts performed on him.

LEON GOOD FAITH EXCEPTION

In *United State v. Leon*, 104 S.Ct. 3405 (1984), the Court was concerned with the then present position of 4th Amendment case law which held that all evidence seized by virtue of a search warrant, which was later found to be legally deficient, **would** be suppressed. The Court used *Leon* to move to a position of a "balanced" approach to this issue and decided it was time to change the position that any evidence seized as a result of a deficient search warrant would be suppressed.

> As yet, we have not recognized any form of good-faith exception to the Fourth Amendment exclusionary rule. But the balancing approach that has evolved during the years of experience with the rule provides strong support for the modification currently urged upon us...our evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers **reasonably relying on a warrant issued by a detached and neutral magistrate** leads to the conclusion that such evidence should be admissible in the prosecution's case in chief.

The Court believed the process of having a neutral magistrate review and pass judgment on the search warrant documents provided a safeguard for a citizens 4th Amendment rights, as opposed to the unfettered discretion a law enforcement officer has when they exercise their authority to seize evidence without the use of a search warrant. The Court accorded great weight to the fact that a neutral detached magistrate determined there was sufficient probable cause to issue the search warrant:

> Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,' " United States v. Chadwick, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538 (1977) (quoting Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948)), we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." United States v. Ventresca, 380 U.S. 102, 106, 85 S.Ct. 741, 744, 13 L.Ed.2d 684 (1965). See Aguilar v. Texas, 378 U.S., at 111, 84 S.Ct., at 1512.
>
> **Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination.** Spinelli v. United States, 393 U.S., at 419, 89 S.Ct., at 590. See Illinois v. Gates, 462 U.S., at 236, 103 S.Ct., at 2331; United States v. Ventresca, supra, 380 U.S., at 108–109, 85 S.Ct., at 745–746. *Leon at 3415*

Even though *Leon* holds evidence to be admissible when a warrant is found to be deficient by a reviewing court, when officers, in good faith, relied on it because it was issue a neutral and detached magistrate, there is an exception that holding:

> *There are 4 narrow instances when an officer's reliance on a warrant is not reasonable: "(1) when the magistrate judge issued the warrant in reliance on a deliberately or recklessly false affidavit; (2) when the magistrate judge abandoned his judicial role and failed to perform his neutral and detached function; (3) when the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable or (4) when the warrant was so facially deficient that it failed to particularize the place to be search or the things to be seized." U.S. v Hodge,* 246 F.3d 301 (3rd Cir. 2001)

None of these factors apply here. Concerning factor (1), there is not a scintilla of proof that Detective Sharp did anything but tell the truth in his affidavit. There was nothing deliberately or recklessly false in one single word he wrote in that affidavit. Again, Defendant's reckless accusations, without any foundation of proof, should be completely disregarded as not credible.

Concerning factor (2), in Detective Sharpe's affidavit and application for search warrant for the "sneak and peek" warrant, he said he had been contacted by another detective from another county who said they were investigating a massage parlor and that massage parlor was "possibly" involved in human trafficking and that Detective Sharp **may** have a spa in is city that was involved as well. This was the only time in the affidavit the term "human trafficking" was mentioned.

Yet, despite that one-time mention of the term "human trafficking", Defendant accuses Judge Coats of abandoning his judicial role and failing to remain neutral and detached. This claim, made in open court by Defendant's attorneys, occurred when they claimed Judge Coates was fixated on the one time the term "human trafficking" was mentioned in the affidavit and application for search warrant. Additionally, Defendant's attorneys, in open court, accused Judge Coats of not reading the entirety of the documents alluding to their belief he stopped reading the documents after a certain paragraph.

Without any foundation to support these baseless assumptions, they are, at the least, reckless, and must be ignored by the court. There is no proof what s ever Judge Coates did anything less than what was required of him and without proof he did otherwise, there is every reason for this court to believe when Judge Coats signed the search warrant he had read it,

analyzed it, considered the level of proof present, determined there was sufficient probable cause to issue the search warrant and signed the search warrant.

This is an extremely reckless allegation, considering Defendant knew that term was only made in passing, was never identified as the crime for which Detective Sharp stated he had probable cause to believe was occurring in the spa and was never mentioned in the probable cause affidavit again.

Concerning factor (3), the evidence establishing probable cause for the crime of Deriving Support from the Proceeds of Prostitution was clearly established in the affidavit for the "sneak and peek" search warrant and acknowledged as such by Judge Coats when he signed the search warrant:

- Evidence in the form of nearly two dozen semen stained napkins
- Documentation, through either actual visual surveillance or video surveillance, of over 104 males entering the business over an eight day period
- Unusual conduct on the part of the male customers entering the Orchids of Asia Day Spa, such as cars containing multiple males all going into the spa; a male actually going inside the spa and coming out and signaling to the males in his car, by making a touchdown sign to his male companions and then all of them going inside the spa
- Printouts from the internet spay site "Rub-Maps, which described the prostitution activity occurring inside the Orchids of Asia Day Spa,; described the type of sexual activity a person could expect to receive from the women who worked there; that at least one woman providing sex for money was called "Lulu", a name found on a discarded paper in one of the trash pulls done by Detective Sharp, a paper on

which there was not only her name but an amount of money written on it, indicating payment and how much that sexual activity would cost; Lulu is Lie Weng, the manager of Orchids of Asia Day Spa

- The traffic stops of 4 different men, travelling in different cars, who, by all appearances, did not know each other; each one describing in detail the sexual activity they engaged in with females working inside the Orchids of Asia Day Spa and how much they paid for that sexual activity; the fact that these four males identified two employees of the spa by their picture; the fact these four males all engaged in these acts of prostitution on the same day, so, it is clear, the prostitution crimes are pervasive inside the spa – not hidden and not isolated and finally, the identification by one of the males who paid for sex at the spa, that he had engaged in this prostitution act with the manager of the spa, Lie Wang.

The totality of the evidence clearly establishes the acts of prostitution are not be committed in a clandestine manner *inside* the spa. Everyone inside the spa, customers and employees, know what goes on inside that building. Probable cause was established that at least one employee and the manager of the spa, Lie Weng, committed acts of prostitution – **at least 4 times on one day.** Considering those facts, along with the extended rub maps information, the large number of semen stained napkins the business doesn't even bother to hide and the disproportionate number of males going into the spa and the manner in which they arrive and act when they get there - unusual it is – it is clear that, not only a large part, if not the majority of the money generated by this business is generated by the acts of prostitution and this money is being used to support the business and the individuals who own it, manage it and work in it.

796.05 Deriving support from the proceeds of prostitution.—

> (1) It shall be unlawful for any person with reasonable belief or knowing another person is engaged in prostitution to live or derive support or maintenance in whole or in part from what is believed to be the earnings or proceeds of such person's prostitution.

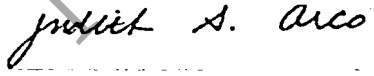
Clearly, Detective Sharp, the affiant in this case, memorializing the evidence in the affidavit as it is described above, has proven the affidavit was not lacking in indicia of probable cause and clearly identified the place to be searched. His affidavit requested the authority to place cameras in the spa to capture the prostitution crimes and the evidence to prove who was deriving support from the money being paid for the sex acts committed by the women inside the business.

In addition to Detective Andrew Sharp, Sergeant Donald Hennessey and other detectives who were part of the execution team for the "sneak and peek" warrant, had read or discussed the "sneak and peek" affidavit and application for search warrant and search warrant with Detective Sharp and they all believed the search warrant to be valid when they executed it.

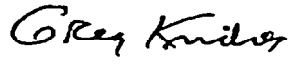
Based on all of these facts, if this court finds the search warrant was improperly issued then, despite that, this court should rely on *Leon* and find the officers reasonably relied on the validity of the search warrant when the placed the cameras inside of the spa and the search was lawful.

Respectfully Submitted

Elizabeth Neto
Bar No. 0225710



Judith Stevenson Arco
Bar No. 0455131



Greg Kridos / Bar No. 00727712

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT a true and correct copy of the foregoing Motion has been furnished by email to Jack Goldberger, Esq., Jack A. Goldberger, Esq, 250 S. Australian Ave, Ste 1400 West Palm Beach, FL 33401, William Burck, Esq.and Alexander Spiro, Esq. at 250 S. Australian Ave, Ste 1400 West Palm Beach, FL 33401, this, the 25th day of April, 2019.

ATTORNEY JACK GOLDBERGER: jgoldberger@agwpa.com;
ATTORNEY ALEX SPIRO: alexspiro@quinnemanuel.com;
ATTORNEY WILLIAM BURCK: williamburck@quinnemanuel.com